Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1218

LEWIS E. NEUGENT

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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OPINIONS OF THE COURTS BELOW

The opinion of the Court of Criminal Appeals of Alabama reversing the conviction is reported as follows:

Neugent v. State, 58 Ala. App. ....., 340 So. 2d 43 (1975)

The opinion of the Supreme Court of Alabama reversing the Court of Criminal Appeals on writ of certiorari is reported as follows:

State ex rel Attorney General (In re: Lewis E. Neugent v. State) 295 Ala. ....., 340 So. 2d 52 (1976).

The opinion of the Court of Criminal Appeals of Alabama on remand is reported as follows:

Neugent v. State, 58 Ala. App. ....., 340 So. 2d 55 (1976).

The opinion of the Supreme Court of Alabama denying further review is reported as follows:

State ex rel Attorney General (In re: Neugent v. State) 58 Ala. App. ....., 340 So. 2d 60 (1976).

JURISDICTION

The Petitioner is seeking the writ under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Does the affidavit present sufficient underlying circumstances to meet the test in the "basis of knowledge" prong of *Aguilar* so as to substantiate the findings of probable cause by the neutral magistrate who issued the search warrant for the residence?

2. Is the statement that information has been received from a person whose record of reliability for correctness has been good sufficient to meet the test in the "veracity" prong of *Aguilar?*

CONSTITUTIONAL PROVISION INVOLVED

The Petitioner is making his claim under the Fourth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

The search warrant was issued only for the search of the Neugent residence and does not set out two separate premises in the disjunctive. The affidavit does set out the

phrase "premises of Neugent Truck Stop and/or Lewis Neugent Residence." The Supreme Court of Alabama does not note omissions in the search warrant.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW IS CLEARLY CORRECT

A.

The decisions of the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama are in line with long and established principles of law of Alabama, of other jurisdictions and of this Honorable Court.

Petitioner first argues that the affidavit in support of the search warrant contains an insufficient factual basis to support a finding of probable cause for the search of the Neugent residence. Secondiy, Petitioner argues that the statement of reliability of the informer is insufficient. Both of these issues were correctly decided by the Supreme Court of Alabama.

The Supreme Court of Alabama held that the timely observation of the drugs at the house coupled with the statement that Neugent was seen selling drugs at the truck stop, which were brought from the residence, was sufficient to satisfy the "basis of knowledge" prong of *Aguilar*.... The Supreme Court of Alabama held further that the disjunctive assertion, "Neugent Truck Stop and/or Lewis Neugent Residence," was not fatal to the state in view of the facts that the neutral magistrate issued the warrant only for the residence

and that the seizure was of drugs in the residence. The court below correctly concluded that as to this disjunctive the averments were in compliance with *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). In *Aguilar, supra*, 378 U.S. at 114, 84 S. Ct. at 1514 and 12 L. Ed 2d 729 that test is stated as follows:

> "[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'"

The first test has been met in the case at bar.

It appears that Petitioner in brief makes inadvertent references to the search *warrant* instead of the *affidavit* in presenting his argument. The search warrant was issued only for the search of the Neugent residence. The affidavit does set out the phrase "premises of Neugent Truck Stop and/or Lewis Neugent Residence."

Petitioner first contends that there was a general or blanket search. Since, however, the warrant was issued only for the search of the Neugent residence, there was no general or blanket search as has apparently been viewed with disdain by this Court. Petitioner also argues that the search of the residence was outside the scope of the warrant. The State of Alabama does not contend that the search of the residence was made legal by a fruitless search of the truck stop, but was legal by the terms of the warrant itself. Therefore, there was no search and seizure outside the scope of the ori-

original warrant. Because there was no seizure in the search of the truck stop, there is here no constitutional issue raised as to that search.

The State of Alabama does contend that the search of the Neugent residence was legal based on a valid warrant issued by a magistrate for the search of the residence. Citing *United States v. Hinton*, 219 F. 2d 324 (7th Cir. 1955) and other cases, Petitioner notes that this Honorable Court has not heretofore ruled directly on the "two premises" issue. The Respondent State of Alabama submits that it is not now incumbent upon this Court to decide the issue since, unlike the warrants found in cases cited by Petitioner Neugent, the warrant in the case at bar was issued only for the Neugent residence.

The affidavit, found at page 48 of Petitioner's brief, reads in pertinent part:

> "The aforesaid informant stated that he saw the said illegal drugs on said premises described on the 9th day of August, 1973, 3 hours prior to making this affidavit. The informant also stated that Lewis Neugent, who resides at the above address, was seen selling amphetamines at the truck stop but the amphetamines are brought from the residence. The information was given to me by said informant August 9, 1973."

This affidavit clearly shows that the informer received his information because he was physically present on the premises and saw the contraband. The informer stated where he was when he saw what he said saw. The informer in the case at bar stated that he saw the illegal drugs on the

Neugent premises; that he saw them being sold; and, that he saw them being brought from the residence where Lewis Neugent resides. Therefore, the magistrate logically concluded that there was probable cause for the search of the Neugent residence.

The affidavit in the instant case details the means by which the information was gathered and describes the criminal activity in a manner that enabled the magistrate to know that it was more than rumor. Under the mandates of this Honorable Court, there was certainly a proper determination of probable cause. *United States v. Harris*, 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *United States v. Ventresca*, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1059, 12 L. Ed. 2d 723 (1964); *United States v. Lefkowitz*, 285 U.S. 452, 52 S. Ct. 420, 76 L. Ed. 877 (1932); *Carroll v. United States*, 267 U.S. 132,, 45 S. Ct. 280, 69 L. Ed. 543 (1925).

B.

As to Petitioner's second contention, the decision of the Supreme Court of Alabama is also correc.t That court reaffirmed its position that a statement of affiant to the effect that he had received information "from a person whose reliability for correctness has been good" was sufficient to meet the "veracity" prong of *Aguilar*. Earlier Alabama cases cite *Aguilar, supra,* and *Spinelli, supra,* in concluding that such a statement is sufficient. The Alabama Supreme Court in the instant case notes that it knows of no United Staes Supreme Court decision to the contrary. Likewise, Petitioner cites no case to the contrary.

It is apparent that the statement of the affiant that he had received information "from a person whose reliability for correctness has been good" shows the affiant's past dealings with the undisclosed informer. Previous mandates of this Court regarding the specificity of statements concerned with the "veracity" of the undisclosed informer prevent the rubber-stamping of search warrants by a magistrate on unverified information. In view of the rationale of these mandates the Respondent knows no cogent reason why such a statement by the affiant, which shows past dealings with an informer, who was reliable, should not be sufficient to satisfy the "veracity" prong of *Aguilar*.

II

THERE IS NO SUBSTANTIAL FEDERAL QUESTION

A.

It is axiomatic that where a state appellate court decision is in line with other decisions of that jurisdiction and with federal law such decision is not properly reviewable by this Honorable Court unless there exists overriding public interest mandating such review. The Petitioner presents neither questions of overriding public interest mandating such review nor questions of first impression.

The decision of the Alabama court with respect to the Petitioner's contention regarding the sufficiency of underlying circumstances to satisfy the "basis of knowledge" prong of *Aguilar, supra,* rests on a firm basis of authority provided by this Honorable Court.

In *Aguilar v. Texas, supra,* this Court set forth a two-pronged test. Then in *United States v. Ventresca,* 380 U.S.

at 107, 85 S. Ct. at 746, 13 L. Ed. 2d at 689, this Honorable Court held:

> ". . . (A)ffidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

Mr. Justice Goldberg continued:

> ". . . (W)here reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hyper-technical, rather than a commonsense manner."

This Honorable Court provided further guidance for appellate courts in *Spinelli v. United States, supra,* and *United States v. Harris, supra.*

It is apparent that the affidavit in the case *sub judice* meets the requirements set forth in these cases. There is reason for crediting the source of the information which was related. The affiant stated that the informer saw the contraband on the Neugent premises; that he saw the contraband being sold; and, that he saw the contraband being

brought from the residence of Lewis Neugent. The warrant was therefore issued for a search of the Neugent residence. This Court has stated that the informed and deliberate determinations of magistrates are to be preferred over the hurried action of officers. The determination of probable cause in the case at bar was made by that detached magistrate. The court below has interpreted the affidavit in a commonsense manner rather than a hyper-technical one which has been condemned by this Honorable Court. The decision in the court below thus complies with the mandates of this Honorable Court.

B.

Likewise, there is no substantial federal question with regard to Petitioner's contention that the "veracity" prong of *Aguilar* is unsatisfied by affiant's statement that he had received information "from a person whose reliability for correctness has been good." This Honorable Court has provided guidance on this issue also. In *Aguilar v. Texas, supra,* this Court held that the magistrate must be informed of some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable.

In *Aguilar, supra,* officers said, "Affiants have received information from a credible person." In *Spinelli, supra,* the affidavit said that the FBI "has been informed by a confidential reliable informant." Both of these conclusions were found lacking by this Court. However, the statement of the affiant in the case *sub judice* shows more than was shown in *Aguilar* and *Spinelli.*

Aguilar, supra, requires only that the magistrate be in-

formed of some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable. The officer in the instant case stated, "I have received information from a person whose record of reliability for correctness has been good." This statement certainly indicates past dealings with the informer whose reliability for correctness in those dealings was good. The affirmation of the officer here, unlike that in *Aguilar*, provided a means to judge the informer's reliability. Certainly, no "batting average" has been or should be required.

Neither of the questions presented for review by Petioner Neugent are of overriding public interest or are of first impression and, therefore, do not require review by this Honorable Court.

III

THERE IS NO CONFLICT OF DECISION

A.

The decision of the court below is in line with decisions of all courts of the State of Alabama, of courts of other jurisdictions, of federal courts and with decisions of this Honorable Court. Petitioner Neugent has neither alleged nor shown any instance in which this decision is in conflict with any other decision.

The most recent landmark decision dealing with rights guaranteed to citizens under the Fourth Amendment is *Stone v. Powell*, ... U.S. ....., ...S. Ct. ....., 49 L. Ed. 2d 1067 (1976). Although that decision deals primarily with the jurisdictional boundaries of the federal courts in granting

habeas corpus relief on Fourth Amendment claims, this Court at 49 L. Ed. 2d 1085 stated:

> ". . . Application of the rule thus deflects the truth-finding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice . . ."

The Respondent submits that this Honorable Court should in reviewing other claims under the Fourth Amendment follow this philosophy. Even if this philosophy is not extended to the review of other Fourth Amendment claims, the search and seizure issue in the instant case was properly decided under the present mandates of this court and there is no conflict between the case *sub judice* and previous controlling decisions of this Honorable Court.

Decisions of the federal intermediate appellate courts also demonstrate that the decision in the instant case was proper and without conflict. In *United States v. Napoli*, 350 F. 2d 1198, 1200 (5th Cir. 1976), the United States Court of Appeals for the Fifth Circuit quoted with approval the following language from *United States v. Ventresca, supra:*

> ". . . But in search warrants there is no place for '(t)echnical requirements of specificity once exacted under common law pleadings.'"

Furthermore, in *United States v. Chester*, 537 F. 2d 173, 175, (5th Cir. 1976), that court stated:

"A probable cause issue can rarely, if ever, he re-

solved with the exact logic of a Euclidean theorem. Each case must turn on its facts. Some guideposts, however, are available to a reviewing court. Only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. *Spinelli v. United States*, 393 U.S. 410, 419, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). The issuing magistrate is not to be confined by niggardly limitations or by restrictions on the use of his common sense. Id. See *United States v. Ventresca*, 380 U.S. 102, 108, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965). And the magistrate's determination of probable cause should be paid great deference on appeal. *Spinelli v. United States, supra*, at 419, 89 S. Ct. 584; *Jones v. United States*, 362 U.S. 257, 270-71, 80 S. Ct. 725, 4 L. Ed 2d 697 (1960).

In *Chester, supra*, Chester argued that the affidavit did not focus enough suspicion on his residence to justify its search as the probable site of a cocaine cache. Drug agents had been watching a red Volkswagen which was parked at Chester's apartment leave and return at the times of various drug deliveries. In concluding that the affidavit was sufficient, the Court of Appeals for the Fifth Circuit at page 176 wrote:

> "Chester argues that the affidavit does not focus enough suspicion on his residence to justify its search as the probable site of the cocaine cache. It seems clear, however, that the magistrate could *reasonably* conclude that the cocaine was *probably* at that site. No more is necessary to justify a warrant. See, e.g., *United States v. Melancon*, 462 F. 2d 82, 89, (5th Cir.), cert, *denied*, 409 U.S. 1038, 93 S. Ct. 516, 34 L. Ed. 2d 487 (1972).

> "No doubt the cocaine could have been somewhere else, but the *possibility* that the cache was at any of several other places does not negate the *probability*, as found by the magistrate, that the appellant's residence was the true location. To list several alternative hypothese regarding the source of the eight ounces and then conclude that it does not necessarily follow that the Stratford Arms residence contained the cache misconceives the nature of the probable cause inquiry.
>
> "The test we must apply is not whether the affidavit's hypothesis *necessarily* follows, but whether the magistrate could reasonably conclude that it probably follows."

Certainly, the magistrate in the case at bar could reasonably conclude that drugs were to be found in the Neugent residence. Indeed, the decision of the Alabama court is not in conflict with, but is in direct line with controlling decisions.

B.

There is no authority to support Petitioner's contention that the "veracity" prong of the *Augilar* test has not been satisfied. The statement, "I have received information from a person whose reliability for correctness has been good," was held to be sufficient by the court below. Respondent knows of no decision which is in conflict with this holding.

In applying the "veracity" test of *Aguilar, supra*, the magistrate is judging the integrity of the informer. Without doubt a statement by affiant showing that he has had past dealings with an informer whose information has proved

to be reliable presents to the magistrate some of the underlying circumstances showing why the affiant knew the informer to be reliable. Thus this statement passes the test.

In *United States v. Freeman*, 358 F. 2d 459 (2nd Cir. 1966) the United States Court of Appeals for the Second Circuit at page 462 held:

> "It is true that in the *Jones* case the informant's story was corroborated by other sources of information, and in *United States v. Ramirez*, 279 F. 2d 712, 715 (2d Cir.), cert denied, 364 U.S. 850, 81 S. Ct. 95, 5 L. Ed. 2d 74 (1960) it was suggested that *"Jones* may require that the affidavit include some factual information independently corroborative of the hearsay report." We believe, however, that *United States v. Ventresca, supra, Aguilar v. State of Texas, supra, Aguilar v. State of Texas, supra* and *Rugendorf v. United States*, 376 U.S. 528, 84 S. Ct. 825, 11 L. Ed. 2d 887 (1964), establish that such corroboration is not required where the affiant attests to the previous reliability of the informant."

The decision in the instant case is clearly in line with principles cited in *Freeman, supra.*

Respondent submits that the decision of the Alabama court follows in all aspects applicable state and federal law including the Fourth Amendment of the United States Constitution.

CONCLUSION

Respondent submits that Petitioner has failed to allege or to show unto this Honorable Court any ground for the

issuance of the writ. Petitioner has failed to show a denial of any right under the Fourth Amendment to the United States Constitution. The State of Alabama, therefore, respectfully prays that the writ be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Walter S. Turner, one of the attorneys for the Respondent and a member of the Bar of the Supreme Court of the United States, and I, Carol Jean Smith, one of the attorneys for Respondent, hereby certify that on this ..... day of March, 1976, we did serve the requisite number of copies of the foregoing Brief and Argument of Respondent on the Honorable Robert M. Hill, Jr., Attorney for Petitioner, whose address is 119 Mobile Street Plaza, Florence, Alabama, 35630, by mailing said copies to him at the aforesaid address with first class postage prepaid.

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